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## IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

#### SECOND APPELLATE DISTRICT

### **DIVISION SEVEN**

CARLY L. COOTER,

Plaintiff and Appellant,

v.

ANGELES NATIONAL GOLF CLUB et al.,

Defendants and Respondents.

B245137

(Los Angeles County Super. Ct. No. BC439058)

APPEAL from a judgment and orders of the Superior Court of Los Angeles County, Mel Red Recana, Judge. Judgment and order denying motion to enforce settlement affirmed; order on motion to strike or tax costs affirmed in part and reversed in part with directions.

Briskin, Latzanich & Pene and Katherine B. Pene; Law Offices of Ann A. Hull and Ann A. Hull for Plaintiff and Appellant.

Gordon & Rees, Roger M. Mansukhani, Matthew G. Kleiner and Erik T. Johnson for Defendants and Respondents.

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#### INTRODUCTION

Carly L. Cooter appeals a judgment in favor of Angeles National Golf Club (the Golf Club) and Angeles National Restaurant Service (the Restaurant) (collectively Angeles National) after a jury trial. The jury found in favor of both defendants on Cooter's causes of action for wrongful termination in violation of public policy, retaliation, harassment, sex discrimination, intentional infliction of emotional distress, failure to prevent harassment, discrimination and retaliation, and failure to provide meal periods and rest breaks. Cooter contends the trial court erred by excluding certain evidence, admitting other evidence, and refusing to allow her to amend her complaint to conform to proof at trial. She also appeals postjudgment orders denying her motion to enforce a settlement agreement and denying in part her motion to strike or tax costs.

We conclude that the trial court erred by excluding certain "me too" evidence of discrimination, harassment, or retaliation against other employees, but that the error was harmless. We further conclude that Cooter has shown no prejudicial error in the admission, over her objection, of certain evidence. We also reject Cooter's argument that the court erred by excluding all of her evidence of race or national origin discrimination and by denying Cooter leave to amend her complaint to conform to proof at trial. Finally, we conclude that the trial court properly denied Cooter's motion to enforce a postjudgment settlement agreement, but we reverse the order denying in part Cooter's motion to strike or tax costs in light of *Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97 (*Williams*) and *Roman v. BRE Properties, Inc.* (2015) 237 Cal.App.4th 1040 (*Roman*).

#### FACTUAL AND PROCEDURAL BACKGROUND

## A. Cooter's Employment at the Golf Course

The Golf Club operates a golf course. The Restaurant operates a restaurant and beverage service at the golf course. Cooter began working at the golf course in August

2004 serving beverages from a cart. She became the supervisor of all beverage cart workers in 2006.

In July 2007 Cooter approached a group of four men on the golf course, greeted them, and offered them drinks from her beverage cart. One of the men, whom she knew as Shawn, commented to his companions about her breasts. They all laughed and drove off. She later encountered the same group of golfers at another hole and again offered them drinks. As she reached into her beverage cart for the drinks, she felt two hands from behind her squeezing her breasts hard and she heard laughter. She turned around and kicked the man who had grabbed her breasts in the shin, cursed at him, and told him not to touch her. When she turned away from him, he grabbed her hips from behind, simulated coitus, and stated, "Oh, Carly. Oh, Carly." She turned, kicked him again, and heard more laughter. She then drove away. Cooter was very upset and felt humiliated.

Cooter went to her supervisor, Morgan Fone, and told her about the incident. Fone stated that she did not know what do to and instructed Cooter to speak with another manager, Ben Krug. When Cooter spoke with Krug, Krug told her to allow the golfers to apologize to her in person, which she refused to do. She then received a voicemail message from Shawn (with other male voices in the background) cursing at her and stating that someone had reported she had been sexually harassed on the golf course, which was "f'n bullshit." The message upset and frightened her.

Cooter went to Krug's office and asked what he had told the golfers to make them so angry with her. Krug stated that he had confronted the golfers about her complaint. When Cooter told Krug about the voicemail message, Krug told her to call them back so he could determine the truth of the matter. Cooter was unhappy but agreed to make the call on speakerphone. Shawn answered the call, told her that they were only joking around, and apologized. Krug indicated that the matter was resolved. Pursuant to Krug's request, Cooter completed an incident report. Cooter subsequently learned that someone left the incident report on the counter in the pro shop where other employees and patrons could see it. Several employees expressed concerns to her about the incident. One of the patrons asked her whether she was "the girl that was groped out here."

The next day Andy Nakano, chief operating officer of both the Golf Club and the Restaurant, called Cooter to discuss the incident. She told him that she was unhappy with the way Krug had handled the situation. Andy Nakano appeared sympathetic, but he stated that she should not have kicked the customer. Shin Nakano, the Golf Club's director of operations and the Restaurant's chief operating officer, asked Cooter to draft a sexual harassment policy for the company. Cooter agreed and drafted a policy, which was distributed to other employees.

Cooter felt that management treated her differently after the incident and scrutinized her more closely. Shin Nakano called Cooter a "drama queen." Management introduced new uniforms that Cooter felt did not fit well around the chest and were uncomfortably tight in the crotch, and management did not allow her to alter her uniform.

On December 19, 2008 Cooter wrote a letter to Shin Nagano stating that she did not feel appreciated anymore and giving two weeks' notice. Shin Nagano said that he did not want her to leave and that he would make her the main bartender at a new clubhouse that was scheduled to open in the spring and would keep her on call for special events. She agreed to stay. Management, however, did not schedule her for any work after that date, despite her requests, and never hired her as a bartender for the new clubhouse.

In February 2009 Cooter sent Shin Nagano an email asking if she could work as a bartender in the new clubhouse. He responded by email on February 20, 2009 stating that he did not know when the clubhouse would open and that there were no events planned. He also stated that he would have the new food and beverage manager contact her.

In April 2009 Luis Villa, the food and beverage manager, called Cooter to interview her for the new bartender position. She thought that Villa was very rude and unprofessional during the interview, and she felt insulted that she had to interview for the position after working at the golf course for several years. Villa told her that they "already had a guy" for the bartender position. She never heard back from Villa after the interview.

On February 21, 2010 Cooter filed a complaint with the Department of Fair Employment and Housing (Department). She received a right-to-sue notice.

## B. *Cooter's Complaint*

On June 3, 2010 Cooter filed this action against the Golf Club, the Restaurant, and several individuals. She asserted causes of action for (1) wrongful discharge in violation of public policy, (2) retaliation in violation of the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.), (3) intentional infliction of emotional distress, (4) failure to prevent harassment, discrimination, or retaliation in violation of FEHA, (5) harassment in violation of FEHA, (6) sex discrimination in violation of FEHA, (7) failure to provide meal periods and rest breaks, (8) failure to pay minimum wages, overtime, and other wages due, and (9) breach of contract. <sup>1</sup>

#### C. The Motions in Limine

Angeles National filed 22 motions in limine, four of which are involved in this appeal. Motion in limine I sought to exclude evidence of lawsuits or administrative claims by other employees against Angeles National. Angeles National argued that this evidence was irrelevant, more prejudicial than probative, and "inadmissible to prove conduct on a specific occasion" under Evidence Code section 1101, subdivision (a). The trial court granted the motion in part, "[l]imited to lawsuits or claims filed with an administrative agency by any other former or current employee of" the Golf Club or the Restaurant.

Prior to trial, the court granted summary adjudication on the eighth cause of action for failure to pay minimum wage. During trial, the court granted nonsuit on the ninth cause of action for breach of contract. Cooter does not challenge either of these rulings. In addition, Cooter does not discuss in her opening brief her third cause of action for intentional infliction of emotional distress or her seventh cause of action for failure to provide meal periods and rest breaks. Thus, she has abandoned any claim of error with respect to those causes of action. (See *Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1533 (*Lewis*); *Garrett v. Howmedica Osteonics Corp.* (2013) 214 Cal.App.4th 173, 180, fn. 4.) Therefore, this appeal involves only the first, second, fourth, fifth, and sixth causes of action.

Motion in limine J sought to exclude evidence of discrimination, harassment, or retaliation that Cooter had not perceived or had occurred outside her presence. Angeles National argued that evidence of other alleged acts of sexual harassment was inadmissible under Evidence Code section 1101, subdivision (a), as character or propensity evidence to prove misconduct. Angeles National also argued that evidence of statements directed at others and not perceived by Cooter was inadmissible hearsay, irrelevant, and unduly prejudicial, confusing, and time-consuming under Evidence Code section 352. The trial court granted the motion in part and excluded evidence of the hiring of prostitutes to work on the golf course, requiring employees to wear lingerie, broadcasting images of female workers' posteriors, and "not taking complaints of sexual harassments and doing nothing to stop them." The court also excluded evidence that an employee had witnessed another female employee performing a sexual act with a patron. The court ruled that evidence of specific conduct not witnessed by Cooter was inadmissible to prove hostile work environment harassment.

Motion in limine K sought to exclude evidence of discrimination, harassment, or retaliation experienced by plaintiffs in four related cases.<sup>2</sup> Angeles National again argued that evidence of conduct not directed at or witnessed by Cooter was irrelevant, unduly prejudicial, and inadmissible under Evidence Code sections 1101, subdivision (a), and 352. The trial court granted the motion in part and excluded evidence of conduct that was not directed at or witnessed by Cooter.

Finally, motion in limine R sought to exclude evidence of racial discrimination or preferential treatment for people of Japanese descent. Angeles National argued that Cooter had not alleged a cause of action for race discrimination and that any evidence of racial discrimination or preferential treatment of people of Japanese descent was irrelevant, unduly prejudicial, and would consume an undue amount of time. The trial court granted the motion in part and excluded evidence that Angeles National had

The trial court related this case to four other cases against Angeles National. In July 2011 the court denied a motion to consolidate the five cases.

imported women from Japan to perform sex acts on the golf course for tips, gave them preferential treatment, and allowed them to wear whatever they wanted and to alter their uniforms.

#### D. The Verdict

After a 15-day trial, the jury returned a special verdict in favor of Angeles National on all remaining causes of action. On the first cause of action for wrongful termination in violation of public policy the jury found that Cooter was not an employee of the Golf Club and, although she was an employee of the Restaurant, the Restaurant did not discharge her. On the second cause of action for retaliation the jury found that Cooter did not complain about sexual harassment, discrimination, or retaliation. On the third cause of action for intentional infliction of emotional distress the jury found that Angeles National's conduct after June 3, 2008 (two years before Cooter commenced this action) was not outrageous.<sup>3</sup> On the fourth cause of action for failure to prevent harassment, discrimination, or retaliation the jury found that Angeles National did not fail to take reasonable steps to prevent harassment, discrimination, or retaliation. On the fifth cause of action for harassment the jury found that Cooter was not subjected to harassment because of her gender on or after February 21, 2009 (one year before she filed her complaint with the Department).<sup>4</sup> On the sixth cause of action for sex discrimination the

The trial court instructed the jury, based on the applicable two-year statute of limitations (Code Civ. Proc., § 335.1), that any liability for intentional infliction of emotional distress had to be based on conduct occurring on or after June 3, 2008. Cooter does not challenge this instruction.

A plaintiff alleging an unlawful employment practice under FEHA must exhaust his or her administrative remedies by filing a complaint with the Department within one year after the challenged conduct occurred and must obtain a right-to-sue notice before commencing a judicial action. (Gov. Code, § 12960, subd. (d); *Blum v. Superior Court* (2006) 141 Cal.App.4th 418, 422.) The trial court instructed the jury on this affirmative defense and on the continuing violations doctrine. (See *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823, *Trovato v. Beckman Coulter, Inc.* (2011) 192 Cal.App.4th 319, 325-326). Cooter does not challenge either the instructions or the special verdict

jury found that Cooter was not an employee of, or an applicant for employment with, the Golf Club, and that the Restaurant did not discharge or refuse to hire her. Finally, on the seventh cause of action for failure to provide meal periods and rest breaks the jury found that Angeles National did not fail to provide any meal period or rest break after June 3, 2007 (three years before Cooter commenced this action).<sup>5</sup>

The trial court entered judgment on the special verdict on September 5, 2012. Cooter timely appealed.

#### E. Settlement Discussions and the Cost Memorandum

On September 26, 2012 Cooter filed a notice of settlement pursuant to California Rules of Court, rule 3.1385, stating that the parties had unconditionally settled the case on September 24, 2012 and that she would be filing a request for dismissal. That same day the parties also filed a stipulation to extend the time for Angeles National to file a memorandum of costs and, purportedly, to extend the time for Cooter "to file a motion for a new trial and/or appeal." The stipulation stated that Angeles National had agreed to waive their rights to recover costs in exchange for Cooter's waiver of her right to appeal and to move for a new trial, and that the parties needed more time to prepare a formal written settlement agreement. Counsel for Cooter and for Angeles National signed the stipulation, but the parties did not. The parties did not seek, and the court did not sign, an order approving the stipulation.

Angeles National filed an objection to Cooter's notice of settlement, stating that the parties "had been engaged in ongoing settlement discussions," that they entered into the stipulation "[i]n order to facilitate these negotiations," and that the parties "have now reached an impasse and are unable to reach a full and final settlement of this action."

form, which required a finding that Cooter was subjected to harassment on or after February 21, 2009 in order to prevail on that cause of action.

Pursuant to the applicable statute of limitations (Code Civ. Proc., § 338), the trial court limited liability for failure to provide meal periods and rest breaks to violations occurring after June 3, 2007. Cooter does not challenge this ruling.

Angeles National concurrently filed a memorandum of costs seeking \$97,991.34, including \$30,876.72 in deposition costs and \$40,875 in expert witness fees pursuant to Code of Civil Procedure section 998.

Cooter filed a motion to enforce the settlement agreement and to strike or tax costs. She argued that the parties, through their attorneys, had agreed to a settlement as set forth in the stipulation, and she asked the trial court to enforce it either pursuant to Code of Civil Procedure section 664.6 or the court's inherent authority. She also argued that the doctrines of judicial estoppel, equitable estoppel, and promissory estoppel precluded Angeles National from recovering costs after representing to Cooter and the trial court that the case had been settled for a waiver of costs. Counsel for Cooter's declaration attached emails that she claimed showed the parties had settled the case, including a September 24, 2012 email from counsel for Angeles National stating, "both carriers have signed off. We have a deal." Cooter argued that she had relied on Angeles National's representation in not filing a notice of intention to move for a new trial. In the alternative, Cooter argued that the court should tax several cost items because they were not recoverable or reasonably necessary.

Angeles National argued in opposition to the motion that, although the insurers had agreed to the proposed settlement, the defendants had not. Angeles National argued that the purpose of the stipulation was to allow additional time for the parties to finalize a settlement, which never occurred, and that any settlement was not enforceable under Code of Civil Procedure section 664.6 because the parties had not signed it. Angeles National also noted that the insurance policies required the insureds to consent to any settlement. Finally, Angeles National argued that judicial estoppel, equitable estoppel, and promissory estoppel did not apply, and that all of the costs sought were recoverable.

The trial court denied the motion to enforce a settlement because the insurance policies provided that the insured must consent to any settlement, and because the parties' failure to sign the stipulation stating they had reached an agreement precluded enforcement under Code of Civil Procedure section 664.6. The court did not address the possible application of judicial estoppel, equitable estoppel, or promissory estoppel.

Finally, the court denied the motion to tax deposition costs and expert witness fees, and granted the motion as to other cost items. The court stated that expert witness fees were recoverable under Code of Civil Procedure section 998 and that Angeles National's section 998 offer was not in bad faith. Cooter timely appealed from these orders.<sup>6</sup>

#### **DISCUSSION**

A. The Trial Court's Order Granting the Motions In Limine To Exclude Cooter's "Me Too" Evidence Was Error, but Harmless

Cooter's primary argument is that the trial court erred by excluding evidence of discrimination, harassment, and retaliation against other employees in the workplace, evidence that is commonly known as "me too" evidence. We conclude that the trial court's order excluding the "me too" evidence was error, but that the error was harmless.

Evidence of discrimination, harassment, or retaliation against other employees in the workplace is relevant to the defendant's discriminatory intent if the incidents were sufficiently similar to the incident involving the plaintiff. (See *McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 296-298 (*McCoy*) [evidence of retaliation against other employees]; *Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 113-114, 124 (*Pantoja*) [evidence of sexual harassment and racial discrimination against other employees]; *Johnson v. United Cerebral Palsy/Spastic Children's Foundation* (2009) 173 Cal.App.4th 740, 767 (*Johnson*) [evidence of pregnancy discrimination against other employees].) Evidence Code section 1101, subdivision (a), does not preclude the admission of such "me too" evidence if the evidence is relevant to prove the defendant's discriminatory intent or some other fact other than the defendant's propensity to commit

An order denying a motion to strike or tax costs is appealable as an order after final judgment (Code Civ. Proc., § 904.1, subd. (a)(2)), as is an order ruling on a postjudgment motion to enforce a settlement. (*Walton v. Mueller* (2009) 180 Cal.App.4th 161, 167.)

an act. (*Pantoja*, *supra*, at pp. 112-114; *Johnson*, *supra*, at pp. 760, 763-767; see Evid. Code, § 1101, subd. (b).)

"[D]irect evidence of intentional discrimination is rare, and . . . such claims must usually be proved circumstantially." (Guz v. Bechtel Nat. Inc. (2000) 24 Cal.4th 317, 354; see Morgan v. Regents of University of Cal. (2000) 88 Cal. App. 4th 52, 68 ["plaintiffs in employment discrimination cases most often lack direct evidence of the employer's discriminatory intent"].) ""A plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled by evidentiary rulings that keep out probative evidence because of crabbed notions of relevance or excessive mistrust of juries." [Citation.] . . . '[C]ircumstantial proof of discrimination typically includes unflattering testimony about the employer's history and work practices—evidence which in other kinds of cases may well unfairly prejudice the jury against the defendant. In discrimination cases, however, such background evidence may be critical for the jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive.' [Citation.]" (Johnson, supra, 173 Cal.App.4th at p. 764.) "Me too" evidence may also be admissible to rebut evidence that the defendant had a policy or practice of not tolerating harassment or discrimination. (Pantoja, supra, 198 Cal.App.4th at p. 116.)

Nevertheless, the trial court has discretion to exclude relevant "me too" evidence under Evidence Code section 352 if its probative value is substantially outweighed by a substantial danger of undue prejudice, confusing the issues, or misleading the jury, or by the probability that its admission would consume an undue amount of time. It is an abuse of discretion, however, if the probative value of the excluded "me too" evidence was significant and the risk of undue prejudice did not substantially outweigh the probative value. (See *Pantoja*, *supra*, 198 Cal.App.4th at p. 118 [trial court abused its discretion by excluding under Evidence Code section 352 "me too" evidence whose probative value was "unquestionable" and where an appropriate limiting instruction would have sufficiently mitigated the risk that the jury would view the evidence as evidence of a propensity to act in a particular manner]; *Johnson*, *supra*, 173 Cal.App.4th at p. 767 [trial

court abused its discretion under Evidence Code section 352 by excluding "me too" evidence of factual scenarios that were sufficiently similar to the incident involving the plaintiff, and because the factual dissimilarities went to the weight of the evidence rather than its admissibility].)

In ruling on motion in limine J, the trial court excluded evidence of conduct that Cooter had not witnessed, including the hiring of prostitutes to work on the golf course, witnessing of sexual acts on the golf course, requiring employees to wear lingerie, broadcasting images of female workers' posteriors, and "not taking complaints of sexual harassments and doing nothing to stop them." In ruling on motion in limine K, the court excluded any evidence of discrimination, harassment, or retaliation experienced by the plaintiffs in the four related cases to the extent that such conduct was neither directed at nor witnessed by Cooter. The court stated that in order for such evidence to be admissible in Cooter's cause of action for hostile work environment harassment the conduct had to have been directed at or observed by Cooter.

These pretrial rulings were an abuse of discretion. Although Cooter's "me too" evidence may not have been admissible to prove harassment, because the conduct was not directed at Cooter and she did not observe it, the evidence was admissible to prove discriminatory intent for purposes of her causes of action for retaliation and sex discrimination. This evidence was also admissible to rebut any evidence by Angeles National that they had a policy or practice of not tolerating harassment, discrimination, or retaliation. The trial court could have addressed any concern that the jury might consider the evidence for an improper purpose with an appropriate instruction limiting the use of such evidence to the issues of the defendants' intent and toleration of harassment, discrimination, and retaliation.<sup>7</sup> (See *Pantoja*, *supra*, 198 Cal.App.4th at p. 118.)

The trial court did not abuse its discretion by excluding, in connection with motion in limine I, evidence of lawsuits or claims filed by other employees, or by excluding, in connection with motion in limine R, evidence of importing "girls from Japan who performed sex acts on the golf course for tips" and giving them preferential treatment. In any event, as discussed, any error in these rulings was harmless as well.

The trial court's erroneous exclusion of Cooter's "me too" evidence, however, was harmless. "No form of civil trial error justifies reversal and retrial, with its attendant expense and possible loss of witnesses, where in light of the entire record, there was no actual prejudice to the appealing party.' [Citation.] Accordingly, errors in civil trials require that we examine 'each individual case to determine whether prejudice actually occurred in light of the entire record.' [Citations.]" (Cassim v. Allstate Ins. Co. (2004) 33 Cal.4th 780, 801-802.) Reviewing courts will not set aside a verdict or reverse a judgment because of the erroneous exclusion of evidence unless the errors "resulted in a miscarriage of justice." (Evid. Code, § 354.) "A miscarriage of justice occurs only when the reviewing court is convinced it is reasonably probable a result more favorable to the appellant would have been reached absent the error." (California Crane School, Inc. v. National Commission for Certification of Crane Operators (2014) 226 Cal. App. 4th 12, 24; see Pannu v. Land Rover North America, Inc. (2011) 191 Cal. App. 4th 1298, 1317 ["trial court's error in excluding evidence is grounds for reversing a judgment only if the party appealing demonstrates a "miscarriage of justice"—that is, that a different result would have been probable if the error had not occurred".

Cooter argues that the exclusion of her "me too" evidence was prejudicial because the excluded evidence would have shown gender bias, discriminatory and retaliatory intent, and failure to prevent harassment, discrimination, and retaliation. She contends that the exclusion of evidence left the jury with the impression that the mistreatment she experienced involved only isolated incidents that were not part of a more pervasive pattern of misconduct.

The error in the court's ruling on the motions in limine was harmless in at least two ways. First, despite the rulings on the motions in limine, the trial court allowed Cooter to present much of the evidence she argues on appeal the rulings on the motions in limine excluded. (See *Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72, 90, fn. 6 (*Cristler*) ["[i]n limine rulings are not binding []'... and are 'subject to reconsideration upon full information at trial'"].) For example, the trial court allowed Cooter to testify at trial that another beverage cart worker had modified her

uniform to facilitate unzipping her top and exposing her breasts. Cooter also testified that golfers had urged her to flash her breasts and told her that "the other girl does it." Krug and Shin Nakano testified that another female beverage cart worker had complained about harassment by a golfer. The court also allowed Fone to testify that golfers would ask why the current beverage cart workers were not as willing as a previous worker "to do body shots and hop in the bushes for extra tips." Fone testified that Cooter and other workers reported hearing similar comments. Fone also testified that in 2008

Andy Nakano asked the beverage cart workers to wear revealing outfits for a tournament, which they declined to do, and that he once stated to Cooter at a company party that "if she busted her tits out on the pool table, he would pull his balls out and we would fly to Vegas." Fone testified further that Andy Nakano would talk about going downtown for special massages and "joke about his girls," and she stated that women at Angeles National did not have the same opportunities to advance in employment as the men had. Thus, part of the court's error was cured by the admission at trial of some of the evidence the court excluded by granting the motions in limine.

Second, the rulings on the motions in limine excluded evidence that was not related to and did not affect the jury's verdict on Cooter's causes of action. For example, Cooter's first cause of action was for wrongful discharge in violation of public policy. The elements of this cause of action are (1) the defendant employed the plaintiff, (2) the defendant discharged the plaintiff, (3) a violation of public policy was a substantial motivating reason for the discharge, and (4) the plaintiff suffered harm as a result. (Ferrick v. Santa Clara University (2014) 231 Cal.App.4th 1337, 1343; see Alamo v. Practice Management Information Corp. (2013) 219 Cal.App.4th 466, 479 (Alamo) [proper standard of causation is "a substantial motivating reason"].) Some of the excluded evidence was relevant to and admissible on the third element, whether a violation of public policy was a substantial motivating reason for Cooter's termination,

A body shot involves licking salt off of another person, taking a shot of tequila, and then taking a lime out of the other person's mouth. (See Urban Dictionary <a href="http://www.urbandictionary.com/define.php?term=body+shot">http://www.urbandictionary.com/define.php?term=body+shot</a>> [as of Sept. 28, 2015].)

because it strongly suggested the existence of gender bias and discriminatory intent. (See *Johnson*, *supra*, 173 Cal.App.4th at p. 767 ["me too" evidence admissible to show the reasons for the plaintiff's discharge in an action for wrongful discharge and sex discrimination].) The jury, however, found that the Golf Club did not employ Cooter (the first element) and that the Restaurant did not discharge her (the second element), issues that are separate from and independent of the issue of whether Cooter's employers were motivated by bias. There is no reasonable probability that admission of Cooter's "me too" evidence would have changed the jury's findings on these issues. (See *Kao v. University of San Francisco* (2014) 229 Cal.App.4th 437, 455 [any error in the admission of evidence on damages for wrongful termination was not prejudicial because the jury found for the defendant on liability].) Therefore any error in the exclusion of evidence was harmless with respect to the wrongful discharge cause of action.

Similarly, the elements of Cooter's second cause of action for retaliation under FEHA are (1) the plaintiff engaged in a protected activity, (2) the employer subjected the plaintiff to an adverse employment action, (3) the protected activity was a substantial motivating reason for the adverse employment action, and (4) the plaintiff suffered harm as a result. (*Lewis, supra,* 224 Cal.App.4th at p. 1533; *Alamo, supra,* 219 Cal.App.4th at p. 479.) Cooter claimed, and the trial court instructed the jury, that the protected activity was Cooter's complaining about sexual harassment, retaliation, or discrimination. As with Cooter's cause of action for wrongful discharge, some of the evidence the trial court excluded was relevant to and admissible on the third element, whether protected activity was a substantial motivating reason for the adverse employment action. (See *McCoy, supra,* 216 Cal.App.4th at p. 297 ["me too" evidence is admissible to prove the defendant's retaliatory intent].) The jury found, however, that Cooter did not complain about sexual harassment, retaliation, or discrimination, and therefore had not engaged in the activity she claimed was protected (the first element). There is no reasonable

Ocoter does not challenge this finding on appeal or argue that it is not supported by substantial evidence.

probability that the excluded "me too" evidence would have had any effect on this finding. Therefore, any error in the exclusion of evidence was harmless with respect to the retaliation cause of action.

Cooter's fifth cause of action was for hostile work environment under FEHA. To prevail on such a claim, the plaintiff must prove, among other elements, that the plaintiff was subjected to unwanted harassing conduct because of the plaintiff's protected status, and either that a supervisor engaged in the conduct or the defendant was aware, or should have been aware, of the conduct and failed to take corrective action. (Roby v. McKesson Corp. (2009) 47 Cal.4th 686, 707; Lewis, supra, 224 Cal.App.4th at p. 1524.) Some of the evidence Cooter argues the trial court improperly excluded was relevant to one of these elements; namely, whether Angeles National was, or should have been, aware of harassing conduct and failed to take corrective action. (See *Pantoja*, *supra*, 198 Cal.App.4th at pp. 114-115, 118.) The jury found that Cooter was not subjected to harassment because of her gender on or after February 21, 2009 (one year before she filed her complaint with the Department and two months after she stopped working at the golf course), so that Cooter failed to meet her burden of proving harassment within the oneyear limitations period. Cooter does not challenge or even acknowledge this finding. Cooter did not work at the golf course after December 2008, and her only significant contact with Angeles National on or after February 21, 2009 was her interview with Villa in April 2009. Cooter does not argue that the excluded evidence was in any way related to her interview with Villa, nor does she explain how the exclusion of the this evidence prejudicially affected the finding that she suffered no harassment on or after February 21, 2009. Therefore, any error in the exclusion of evidence was harmless with respect to the hostile work environment cause of action.

Finally, the elements of a cause of action for discrimination under FEHA, Cooter's sixth cause of action, are (1) the defendant was an employer, (2) the plaintiff was an employee of the defendant or an applicant for employment with the defendant, (3) the defendant discharged or refused to hire the plaintiff or subjected the plaintiff to some other adverse employment action, (4) the plaintiff's protected status was a substantial

motivating reason for the defendant's decision, and (5) the plaintiff suffered harm as a result. (Gov. Code, § 12940, subd. (a); *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 231; *Alamo, supra*, 219 Cal.App.4th at p. 479; *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713.) Some of the excluded evidence was relevant to and admissible on the fourth element, the employer's motivating reasons. (*Johnson, supra*, 173 Cal.App.4th at p. 767.) The jury found, however, that the Golf Club did not employ Cooter (i.e, Cooter failed to meet her burden on the second element) and the Restaurant did not discharge or refuse to hire her (i.e., Cooter failed to meet her burden on the third element). The excluded evidence did not relate to these elements. Therefore, any error in the exclusion of evidence was harmless with respect to the sex discrimination cause of action.

## B. The Trial Court Did Not Err in the Admission of Certain Evidence, and Any Error Was Harmless

Cooter argues that the trial court erred by allowing Angeles National to introduce into evidence an employee handbook that included written policies against discrimination and harassment, an acknowledgment of Cooter's receipt of the handbook, minutes of management meetings, and "[a]cknowledgments of receipt and other documents from the personnel files of various other witnesses." She argues that because Angeles National did not produce these documents in discovery the trial court should have excluded them at trial. She also argues that some of the documents were not properly authenticated and contained inadmissible hearsay. We review these evidentiary rulings for abuse of discretion. (See *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1078; *Kim v. True Church Members of Holy Hill Community Church* (2015) 236 Cal.App.4th 1435, 1449.)

We see no abuse of discretion. Cooter has not cited to evidence showing that she propounded discovery requesting any of these documents or that Angeles National failed to produce them in response to any such discovery requests. Although Cooter asserted at trial that Angeles National had not produced some of the documents in response to her

discovery requests, she provided no evidence in support of her assertion. Failure to produce documents in discovery cannot be the basis of excluding the documents at trial unless the party seeking exclusion on that ground asked for the documents in discovery. Moreover, subject to exceptions not applicable here, before a court may impose an evidentiary sanction for misuse of the discovery process, "there must be a failure to obey an order compelling discovery." (*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1423.) Cooter has not shown either that she sought or that Angeles National failed to comply with a court order compelling the production of the documents the trial court admitted over her objection.

Cooter's argument that some of the documents were not properly authenticated and contained inadmissible hearsay also is unpersuasive. Much of her argument is not preserved on appeal. An appellant must timely and specifically object to the admission of evidence in order to challenge the ruling on appeal. (Evid. Code, § 353, subd. (a).) Cooter, however, does not cite to any part of the record showing that she did so. Our review of the record shows that she objected to the employee handbook without specifying the basis for the objection. She therefore forfeited any argument that the court erred in overruling her objection to the admission of the handbook. 10 (See Faigin v. Signature Group Holdings, Inc. (2012) 211 Cal.App.4th 726, 749.) Cooter did object at trial to the admission of the acknowledgment of receipt based on lack of authentication, but she did not object that it was hearsay, thus forfeiting any challenge on appeal to the court's evidentiary ruling on that ground. And Cooter did object to the admissibility of some of the minutes of management meetings based on hearsay and other grounds, but not on the ground that the minutes were unauthenticated. Moreover, Cooter has not identified some of the documents she argues the trial court erroneously admitted, instead referring generally to minutes of management meetings, "[a]cknowledgements of receipt

In any event, Mariko Ito, Angeles National's human resources representative, authenticated the employee handbooks for the Golf Club and the Restaurant that the trial court received into evidence at trial.

and other documents." (See *Cristler*, *supra*, 171 Cal.App.4th at pp. 89-90 ["[i]f the appellant fails . . . even to identify the specific testimony that was allegedly erroneously admitted, much less craft an argument intended to show why that testimony was both objectionable and sufficiently prejudicial to warrant reversal, the challenge must fail"].)

In any event, any error in the admission of this evidence was harmless in light of the jury's findings. (See *Kim v. True Church Members of Holy Hill Community Church*, *supra*, 236 Cal.App.4th at p. 1449 ["[a] party challenging a trial court's evidentiary rulings must demonstrate both an abuse of discretion and a consequent miscarriage of justice"].) To the extent the employee handbook, acknowledgment of receipt, and meeting minutes tended to show that Angeles National had a policy and practice against discrimination and harassment in the workplace, that evidence did not affect the dispositive findings on the causes of action for wrongful termination, retaliation, harassment, and gender discrimination. As noted, the jury found that Cooter was not an employee of the Golf Club, that the Restaurant did not discharge or refuse to hire her, that she did not complain about sexual harassment, retaliation, or discrimination, and that she was not subjected to harassment because of her gender on or after February 21, 2009. Cooter has not shown that the evidence she argues the trial court erroneously admitted was related in any way to these findings.

C. Cooter Cannot Prevail on her Fourth Cause of Action for Failure to Prevent Harassment, Discrimination, or Retaliation

An employer cannot be liable for failing to prevent harassment, discrimination, or retaliation absent a finding that such an actionable unlawful employment practice actually occurred. (*Dickson v. Burke Williams, Inc.* (2015) 234 Cal.App.4th 1307, 1317-1318.) Because we affirm the judgment in favor of Angeles National on Cooter's causes of action for harassment, gender discrimination, and retaliation, we must affirm the judgment on her fourth cause of action for failure to prevent harassment, discrimination, or retaliation.

## D. The Trial Court Did Not Err in Excluding Certain Evidence of Race and National Origin Discrimination

Cooter argues that the trial court erred by excluding all evidence of discrimination based on race or national origin under Evidence Code sections 350 and 352. She does not challenge the merits of the court's evidentiary ruling. Instead, citing *Edwards v*. *Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 27-28, she argues that, although her complaint did not include a cause of action for race or national origin discrimination, excluding all evidence on a claim was tantamount to granting a motion for judgment on the pleadings or nonsuit and is subject to the same standard of review. She also argues that the court abused its discretion by denying her request for leave to amend her complaint to conform to proof at trial to allege a cause of action for race or national original discrimination.

The exclusion of all evidence relating to a cause of action in a complaint is the functional equivalent of judgment on the pleadings or a nonsuit. (*Dillingham-Ray Wilson v. City of Los Angeles* (2010) 182 Cal.App.4th 1396, 1402-1403.)

Cooter cites no authority for the proposition that this rule applies where the trial court excludes all evidence on a claim that the plaintiff did not allege. Cooter did not allege a cause of action for race or national origin discrimination. Her complaint includes, as one of the general allegations she incorporated into each cause of action, an allegation that Japanese employees received preferential treatment. But Cooter never alleged a cause of action for discrimination based on race or national origin. The trial court did not err by excluding evidence relating to a claim Cooter did not bring.

Cooter also argues that the court erred by not allowing her to amend her complaint to conform to proof at trial by adding a claim for discrimination based on race or national origin. The record shows, however, that Cooter never asked the court for leave to amend her complaint to conform to proof at trial.<sup>11</sup> Cooter cites to a discussion in which her

Cooter appears to acknowledge that she never requested leave to amend her complaint to conform to proof at trial by arguing in her reply brief that, because the trial

attorney stated, before the court had empanelled the jury, that discovery had disclosed fraudulent conduct and that there might be a basis to amend her complaint to conform to proof at trial by alleging a fraud cause of action. The court stated, "I don't see that happening," and indicated that it would sustain an objection to any evidence not relevant to the causes of action alleged in the complaint. Counsel for Cooter responded that, if after the admission of evidence there were a basis for amendment, she would address the issue at that time. The court agreed. Later, during the trial, the court, consistent with its ruling on motion in limine R, sustained Angeles National's objection to the question whether Cooter believed that female Japanese workers received preferential treatment. Contrary to Cooter's assertion, however, her attorney never requested leave to amend her complaint to conform to proof at trial, and the trial court never denied such a request.

E. The Trial Court Properly Denied the Motion to Enforce a Settlement
Cooter challenges the trial court's order denying her motion to enforce a
postjudgment settlement she claims the parties reached. Cooter argues that the trial court
should have enforced the settlement agreement under its inherent powers or under the
doctrine of judicial estoppel, equitable estoppel, or promissory estoppel. She argues
that she reasonably relied on Angeles National's representation in the stipulation that the
case was settled, and that the time for her to file a new trial motion was extended, by

Code of Civil Procedure section 664.6 establishes a summary procedure for enforcing a settlement agreement without the need to file a new lawsuit or a summary

failing to timely move for a new trial.

court excluded evidence of discrimination based on race or national origin, "there was no evidence admitted to allow for a motion to amend to conform to proof."

Cooter does not argue on appeal that the settlement agreement was enforceable under Code of Civil Procedure section 664.6. A written settlement agreement is enforceable under section 664.6 only if it is signed by the parties and not solely by their attorneys. (*Levy v. Superior Court* (1995) 10 Cal.4th 578, 586; *J.B.B. Investment Partners, Ltd. v. Fair* (2014) 232 Cal.App.4th 974, 984-985 (*J.B.B.*).) There is no settlement agreement signed by the parties here.

judgment motion in the pending action or to amend pleadings to allege the settlement as an affirmative defense. (*In re Marriage of Woosley* (2013) 220 Cal.App.4th 881, 898; *Critzer v. Enos* (2010) 187 Cal.App.4th 1242, 1252-1254 & fn. 11.) "Because of its summary nature, strict compliance with the requirements of [Code of Civil Procedure] section 664.6 is prerequisite to invoking the power of the court to impose a settlement agreement.' [Citation.]" (*J.B.B.*, *supra*, 232 Cal.App.4th at p. 984.) Cooter cites no authority for the proposition that the trial court had the authority under its inherent powers to grant her postjudgment motion, or to use some other summary procedure, to enforce a settlement without satisfying the statutory requirements under Code of Civil Procedure section 664.6. We therefore "treat the point as forfeited and pass it without consideration." (*Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52.)

Moreover, the doctrine of judicial estoppel does not apply. The doctrine of judicial estoppel prevents a party from gaining an advantage by taking inconsistent positions in judicial or quasi-judicial administrative proceedings. ""The doctrine's dual goals are to maintain the integrity of the judicial system and to protect parties from opponents' unfair strategies. [Citation.] Application of the doctrine is discretionary."" [Citation.] The doctrine applies when "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake."..." (People v. Castillo (2010) 49 Cal.4th 145, 155, italics omitted.) "[J]udicial estoppel is an equitable doctrine, and its application, even where all necessary elements are present, is discretionary. [Citations.]" (MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc. (2005) 36 Cal.4th 412, 422, italics omitted.) We review any factual findings in connection with a ruling on judicial estoppel for substantial evidence, and we review de novo whether judicial estoppel can apply as a matter of law to those facts. (Miller v. Bank of America, N.A. (2013) 213 Cal. App. 4th 1, 10.)

Cooter does not discuss the essential elements of judicial estoppel. In particular, she has not shown that the trial court accepted as true the representation in the stipulation that the case was settled or that the time to file a new trial motion was extended. Instead, the record shows that the court made no determination and took no action based on the stipulation. Absent a showing that Angeles National successfully asserted a position that the trial court accepted as true, there is no danger of inconsistent judicial determinations and no threat to the integrity of the judicial system. (See *Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 451-454 [judicial estoppel inapplicable where the court did not adopt the prior position of the party to be estopped]; *Swahn Group, Inc. v. Segal* (2010) 183 Cal.App.4th 831, 845-846 [same].) Therefore, Cooter failed to establish the necessary elements of judicial estoppel.

"[T]he doctrine of equitable estoppel is founded on concepts of equity and fair dealing.' [Citation.] 'The essence of an estoppel is that the party to be estopped has by false language or conduct "led another to do that which he [or she] would not otherwise have done and as a result thereof that he [or she] has suffered injury." [Citation.]' [Citation.]' (Steinhart v. County of Los Angeles (2010) 47 Cal.4th 1298, 1315.) The party asserting the estoppel must have reasonably relied on the representation or conduct. (Vu v. Prudential Property & Casualty Ins. Co. (2001) 26 Cal.4th 1142, 1152; Windsor Pacific LLC v. Samwood Co., Inc. (2013) 213 Cal.App.4th 263, 271-272.)

"It is well settled that "[a] judgment or order of the lower court is presumed correct." [Citation.] An appellant must affirmatively demonstrate error occurred and, when the appellate record is silent on a matter, the reviewing court must indulge all intendments and presumptions that support the order or judgment. [Citation.]" (*Estate of Bonzi* (2013) 216 Cal.App.4th 1085, 1101.) Absent an indication to the contrary, we presume that the trial court found all facts necessary to support the order (*Pellegrini v. Weiss* (2008) 165 Cal.App.4th 515, 534), including the finding that Cooter's reliance on the stipulation in failing to timely move for a new trial was unreasonable. Substantial evidence supports that implied finding.

The joint stipulation filed on September 26, 2012 stated that Angeles National had agreed to a waiver of costs in exchange for Cooter's waiver of her right to appeal and to move for a new trial, and that the parties needed more time to finalize a written settlement agreement. The stipulation extended the time for Angeles National to file a memorandum of costs and purported to extend the time for plaintiff to file a new trial motion and a notice of appeal. Cooter, who was represented by counsel at the time, claimed that she relied on the stipulation by not filing a new trial motion within the time allowed by statute. The time to file a notice of intention to move for a new trial, however, is jurisdictional and the parties cannot extend it by stipulation. (Code Civ. Proc., § 659; Simplon Ballpark, LLC v. Scull (2015) 235 Cal.App.4th 660, 663.) It is not reasonable to rely on a promise that is jurisdictionally and legally impossible to rely on. This substantial evidence supports the trial court's implied finding that Cooter's reliance on the stipulation in failing to timely file a new trial motion was unreasonable. Equitable estoppel does not apply.

The doctrine of promissory estoppel provides that a promise is enforceable in some circumstances despite the absence of consideration for the promise, if necessary to avoid injustice. (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 310.) The party asserting promissory estoppel must have reasonably relied on the promise. (*Joffe v. City of Huntington Park* (2011) 201 Cal.App.4th 492, 513.) Thus, reasonable reliance is a necessary element of promissory estoppel. (*Granadino v. Wells Fargo Bank, N.A.* (2015) 236 Cal.App.4th 411, 418.) As explained, substantial evidence supports the implied finding that Cooter's reliance on the stipulation in failing to timely file a new trial motion was unreasonable. Promissory estoppel therefore is also inapplicable.

Cooter timely appealed the judgment and does not contend she acted in reliance on the stipulation by failing to file a notice of appeal.

# F. The Trial Court Must Reconsider the Award of Costs Other Than Expert Witness Fees

Cooter challenges the award of costs against her, arguing that the \$30,876.72 in deposition costs Angeles National incurred was not reasonable and necessary, and that the \$40,875 in expert witness fees was not actually incurred and reasonably necessary. Cooter also argues that Angeles National should not recover any of its expert witness fees because its \$125,000 settlement offer under Code of Civil Procedure section 998, which Cooter rejected, was unreasonable or in bad faith. She also argues that the trial court should have reduced the cost award in light of her limited financial means and other circumstances.

After the trial in this action, the California Supreme Court decided *Williams*, *supra*, 61 Cal.4th 97, which held that an award of ordinary costs in a FEHA action is discretionary under Government Code section 12965, subdivision (b), rather than mandatory under Code of Civil Procedure section 1032, subdivision (b). (*Williams*, *supra*, at p. 105.) *Williams* also held that the trial court must exercise its discretion under section 12965, subdivision (b), consistent with *Christianburg Garment Co. v. EEOC* (1978) 434 U.S. 412 [98 S.Ct. 694, 54 L.Ed.2d 648] (*Christianburg*), which held that in certain federal civil rights actions "a prevailing *plaintiff* should ordinarily receive his or her costs and attorney fees unless special circumstances would render such an award unjust." (*Williams*, *supra*, at p. 115, citing *Christianburg*, *supra*, 434 U.S. at pp. 416-417.) "A prevailing *defendant*, however, should not be awarded fees and costs unless the court finds the action was objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so. [Citation.]" (*Williams*, *supra*, at p. 115.)

In *Roman*, *supra*, 237 Cal.App.4th 1040 we followed *Christianburg*, *supra*, 434 U.S. 412 and *Williams*, *supra*, 61 Cal.4th 97 and reversed a cost award in favor of the defendant where the court had not found that the plaintiffs' FEHA claim was objectively without foundation. (*Roman*, *supra*, at p. 1058; see *Higgins-Williams v. Sutter Medical Foundation* (2015) 237 Cal.App.4th 78, 88 (*Higgins-Williams*) [cost award against the plaintiff in a FEHA action remanded for reconsideration in light of *Williams*]; *Baker v.* 

Mulholland Security & Patrol, Inc. (2012) 204 Cal.App.4th 776, 783 (Baker) [an award of expert witness fees under Gov. Code, § 12965, subd. (b), against the plaintiff required a Christianburg finding].) We also held that, unless the plaintiffs' FEHA claim was frivolous, the court could award costs under Code of Civil Procedure section 1032, subdivision (b), as to the non–FEHA claims only if those costs could be allocated entirely to the non–FEHA claims. (Roman, supra, at pp. 1059-1062.)

Christianburg, supra, 434 U.S. 412, however, does not apply to an award of expert witness fees under Code of Civil Procedure section 998. (Holman v. Altana Pharma US, Inc. (2010) 186 Cal.App.4th 262, 282.) Code of Civil Procedure section 998, subdivision (c)(1), authorizes a discretionary award of expert witness fees and other costs against a plaintiff who does not accept a statutory offer to compromise if the plaintiff fails to obtain a more favorable judgment. The settlement offer must be reasonable (Najah v. Scottsdale Ins. Co. (2014) 230 Cal.App.4th 125, 143 (Najah)), and the expert witness fees must be "actually incurred and reasonably necessary" (Code Civ. Proc., § 998, subd. (c)(1)). Although an award of expert witness fees under Government Code section 12965, subdivision (b), requires a Christianburg finding (Baker, supra, 204 Cal.App.4th at p. 783), an award of expert witness fees under Code of Civil Procedure section 998 does not, and Christianburg does not limit a court's discretion to award expert witness fees as costs under section 998. (Holman, supra, at p. 282.)

Here, Angeles National is entitled to an award of costs under Government Code section 12965, subdivision (b), only if the trial court finds that (1) the action was objectively without foundation when Cooter filed it or Cooter continued to litigate after it clearly became so, or (2) particular allowable costs can be allocated solely to her non-FEHA claims. Because the trial court did not make such findings, we reverse the order on Cooter's motion to strike or tax costs to the extent that it awarded costs other than

We requested and received from the parties supplemental briefing on the impact of *Williams*, *supra*, 61 Cal.4th 97, *Roman*, *supra*, 237 Cal.App.4th 1040, and *Higgins–Williams*, *supra*, 237 Cal.App.4th 78, on the costs awarded in this case.

expert witness fees, and we direct the trial court to reconsider the cost award under this legal standard.

In contrast, the award of expert witness fees under Code of Civil Procedure section 998 was proper absent an abuse of discretion. ""The reasonableness of a defendant's section 998 settlement offer is evaluated in light of 'what the offeree knows or does not know at the time the offer is made." 'Where the defendant obtains a judgment more favorable than its offer, "the judgment constitutes prima facie evidence showing the offer was reasonable. . . . "" "Whether a section 998 offer was reasonable and made in good faith is left to 'the sound discretion of the trial court." "In reviewing an award of costs and fees under Code of Civil Procedure section 998, the appellate court will examine the circumstances of the case to determine if the trial court abused its discretion in evaluating the reasonableness of the offer or its refusal." "["]The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power."" (Najah, supra, 230 Cal.App.4th at pp. 143-144, citations omitted; see Adams v. Ford Motor Co. (2011) 199 Cal.App.4th 1475, 1484 (Adams).)

The trial court did not abuse its discretion in determining that the \$125,000 settlement offer was reasonable and in good faith. The jury's defense verdict gives rise to a presumption that the offer is reasonable (*Adams*, *supra*, 199 Cal.App.4th at p. 1484), which Cooter has not rebutted. Contrary to Cooter's argument, the fact that the court overruled a demurrer and denied a motion for summary judgment does not compel the conclusion that the offer was unreasonable. (See *Regency Outdoor Advertising, Inc. v. City of Los Angeles* (2006) 39 Cal.4th 507, 531 [city's settlement offer in an inverse condemnation action to pay \$1,000 and remove a tree was reasonable despite the prior denial of the city's summary judgment motion]; *Najah*, *supra*, 230 Cal.App.4th at p. 144 [insurer's \$30,000 settlement offer in an insurance coverage action was reasonable despite the prior denial of the insurer's summary judgment motion].)

The trial court also did not abuse its discretion in determining that the expert witness fees awarded were reasonably necessary. Cooter does not state any reason or cite to any evidence showing that the fees were not reasonably necessary. She argues only that when she objected to the cost memorandum the burden shifted to Angeles National to support its cost memorandum with documentation. The law, however, is to the contrary. "A 'verified memorandum of costs is prima facie evidence of the propriety' of the items listed on it, and the burden is on the party challenging these costs to demonstrate that they were not reasonable or necessary. [Citation.]" (*Adams, supra*, 199 Cal.App.4th at p. 1486.) Conclusory claims that fees were not reasonably necessary, without factual support, do not satisfy the burden of the party moving to tax costs. (*Ibid.*; *Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1266.)

Finally, we reject Cooter's argument that the trial court failed to specifically award expert witness fees. The court awarded expert witness fees by denying the motion to strike or tax those fees and ruling that the fees were recoverable under Code of Civil Procedure section 998.

#### DISPOSITION

The judgment and the order denying the motion to enforce settlement are affirmed. The order granting in part and denying in part the motion to strike or tax costs is affirmed as to the award of expert witness fees and reversed as to the award of all other costs with directions to reconsider the cost award in light of *Williams*, *supra*, 61 Cal.4th 97 and *Roman*, *supra*, 237 Cal.App.4th 1040. Each party is to bear its costs on appeal.

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We concur:

PERLUSS, P. J.

ZELON, J